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IN THE

Supreme Court of the United States

October Term, 1986

HUBBARD BROADCASTING, INC.,

Petitioner,

vs.

METROPOLITAN SPORTS FACILITIES COMMISSION; AMERICAN SIGN AND INDICATOR CORPORATION; TWIN CITIES FEDERAL SAVINGS AND LOAN ASSOCIATION; AND AMERICAN SIGN AND INDICATOR CORPORATION / TWIN CITY FEDERAL SAVINGS AND LOAN ASSOCIATION, A JOINT VENTURE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONSE OF METROPOLITAN SPORTS COMMISSION IN OPPOSITION TO PETITION

OLSON, GUNN AND SERAN, LTD.
*Wayne H. Olson
David R. Knodell
315 Peavey Building
730 Second Avenue South
Minneapolis, Minnesota 55402
Telephone: (612) 339-8846
Attorneys for Respondent Metropolitan Sports Facilities Commission

**Counsel of Record*

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STATEMENT OF THE CASE

Petitioner Hubbard's statement of the case fails to emphasize five important facts: (1) the Stadium is a commercial venture; (2) the sale of scoreboard system advertising panels is a commercial venture; (3) this case concerns only *commercial* speech to which the Constitution accords less protection than other expression;[1] (4) the Commission

wanted no more advertising space than was necessary to obtain a free scoreboard; and (5) ASI/TCF sold the available advertising space without direction from the Commission as to (i) product category, (ii) potential advertisers, or (iii) marketing method.

Hubbard's statement of the case is wrong in two important respects.

First, Hubbard insinuates that the lower courts were wrong to recognize that the sale of advertising space on an exclusive-by-product-category basis maximizes revenues from the limited space available, Petition Appendix A-4, -9, -27 to -28, by inaccurately summarizing two portions of of the record, Poss App. 234, Turner App. 256. Petition 4.[2] In fact, Hubbard's president agreed that being an exclusive advertiser has an economic benefit. Hubbard App. 181 1.24 to 182 1.2. Hubbard's real concern, that its competitor had the exclusive, Hubbard Deposition, Commission Ct. of App. Reply Br. Add. 16 1.20 to 17 1.18, demonstrates how exclusives maximize revenue.

Second, Hubbard incorrectly claims that space was available for its advertisement. Petition 5. When the Stadium

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[1] *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505-07, 513, 514 (1981), *Central Hudson Gas and Electric Corporation v. Public Service Commission*, 447 U.S. 557, 562-63 (1980), *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 455-56 (1978), *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977), *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 69 n.32 (1976), *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 248, 773 n.24 (1976).

[2] While Poss, the Commission's Executive Director agreed that he did not make an independent investigation, his "general judgment" based on his dealings with other stadium managers and scoreboard suppliers was that the exclusive-by-product-category basis would maximize revenues. Turner, the ASI salesman did not concede that he did not know whether sale of advertising on a nonexclusive basis could be as profitable: he agreed that he had not tried to sell advertising on a nonexclusive basis; he knew that other scoreboard manufacturers sold advertising on an exclusive basis; he did not know if any sold advertising on a nonexclusive basis.

opened, two scoreboard advertising panels remained unsold. However, those panels were not available to a soft drink company, a brewer, a tobacco company, a fast food chain, a hardware store chain, a financial institution or a broadcaster because space had been sold in each of those product categories on an exclusive basis. To any prospective advertiser in each of those categories, only one space was available, and it was sold on a simple, non-discriminatory first-come, first-served basis.

Finally, one set of facts is totally absent from Hubbard's statement of the case. More than two years before the Commission entered into the scoreboard contract, more than three years before ASI/TCF sold advertising space, Hubbard had been invited to participate in a scoreboard system proposal, knew that advertising might be sold on an exclusive basis, was concerned that WCCO might obtain the broadcaster advertising space, and knew that TCF was a likely participant in the Stadium scoreboard system. Hubbard App. 174-78.

ARGUMENT

Hubbard argues for review on the grounds that the Eighth Circuit's public forum analysis (and consequent conclusion) conflicts with *Cornelius v. NAACP Legal Defense and Education Fund,* 473 U.S. —, 87 L.Ed. 2d. 567 (1986) and decisions in other circuits. However, there is no requirement, even for a limited public forum, that a public facility must be expanded to accommodate more speakers where the existing space has been allocated fairly. *See, Heffron v. International Society of Krishna Consciousness, Inc.,* 452 U.S. 640, 649 (1981). Hubbard's effort to find fault with the Eighth Circuit's public forum analysis is a desperate attempt

to obscure an obviously correct result and elevate application of a means of analysis to the ultimate issue.

Hubbard also attempts to obtain review by inserting a viewpoint neutrality issue into this case. It claims viewpoint discrimination because WCCO is on the scoreboard and Hubbard is not. However, WCCO is on and Hubbard off because of limited space and the action and inaction of WCCO and Hubbard in seizing the opportunity, not governmental action.

Hubbard attempts to evade *Heffrons* approval of "first-come, first-served" space allocation, by claiming that a "first-approached, first-served" allocation system was used rather than "first-come, first-served." Hubbard's semantics ignore the fact that ASI/TCF had to make its first sales call somewhere.

ASI/TCF, not the Commission, decided how to market the space. ASI was in the business of selling advertising on scoreboard advertising panels. It knew whom the potential advertisers were and how much they would pay. Obviously, ASI would sign up the first advertiser in a category who expressed a willingness to pay the going rate. Hubbard had ample opportunity to be the first broadcast advertiser. Hubbard had known for three years about the potential sale of advertising on an exclusive basis and knew that advertising space for a broadcaster was about to be sold before the sale to WCCO. But Hubbard sat back and waited.

The actual holdings of the cases from other circuits which Hubbard cites are not in conflict with the Eighth Circuit's decision in this case. None of those cases involved all the elements of this case: a governmental commercial venture; a claim that *commercial* speech was wrongly abridged; limited space available for speech; and no government, content-based discrimination.

Only *American Future Systems, Inc. v. Pennsylvania State University*, 752 F.2d 854 (3rd. Cir. 1984) *cert. denied sub nom Johnson v. Pennsylvania State University*, — U.S. —, 87 L.Ed. 2d (1985) involved commercial speech. It upheld the challenged regulation. In *International Society for Krishna Consciousness, Inc. v. New Jersy Sports and Exposition Authority*, 691 F.2d 155 (3rd Cir. 1982), the Third Circuit held that a major public sports complex is a nonpublic forum.

Lebron v. Washington Metro Area Transit Authority, 749 F.2d 893 (D.C. Cir. 1984) and *U.S. Southwest Africa/Namibia Trade and Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983) both involved political speech. In *Lebron* there was no public forum dispute or space availability question; the denial of speech was based on content. *Namibia*, the *Dulles Airport case*, recognized revenue maximization as valid for regulating advertising space and first-come, first-served as appropriate for allocating limited advertising space in a public forum. 708 F.2d at 768, 771-73.

Planned Parenthood Association v. Chicago Transit Authority, 767 F.2d 1225 (7th Cir. 1985) turned on the blatant discrimination by the public body against the social-political content of the advertisement. The advertising space had long been used for public interest and political-social speech as well as commercial advertisement. Space availability was not a factor.

Neither *San Diego Committee Against Registration and the Draft v. Governing Board*, 790 F.2d 1471 (9th Cir. 1986), nor *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985) *aff'd and dem'd sub nom. City of Los Angeles v. Preferred Communications*,

Inc., 476 U.S. —, 106 S.Ct. —, 90 L.Ed. 2d (1986) involved *commercial* speech, a government commercial venture or limited space. The first turned on content based discrimination; the second on the potential for it.

CONCLUSION

Respondent Commission urges the Court to deny the writ of certiorari.

The decision below does not conflict with decisions of the Court or other circuits. Neither the Commission nor ASI/TCF preferred the speech of Hubbard's competitor over Hubbard's speech. The first-come, first-served allocation of advertising space did not permit covert discrimination.

Finally, although it was expedient in the lower courts to address this case in terms of "commercial speech" and "public forum" principles, there is, as the district court noted, Petition Appendix A-27, a substantial question about whether governmental action, which would necessitate the first amendment analysis, was even present in this case.

Respectfully submitted,

OLSON, GUNN AND SERAN, LTD.
*Wayne H. Olson
David R. Knodell
315 Peavey Building
730 Second Avenue South
Minneapolis, Minnesota 55402
Telephone: (612) 339-8846
Attorneys for Respondent
Metropolitan Sports Facilities
Commission

**Counsel of Record*